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THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

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11 THE REGENTS OF THE } Case No.: C 07 2721 PJH
12 UNIVERSITY OF CALIFORNIA, }
13 Plaintiff, } PLAINTIFF'S MEMORANDUM OF
14 vs. } POINTS AND AUTHORITIES IN
15 INDEMNITY INSURANCE } REPLY TO OPPOSITION TO
16 COMPANY OF NORTH AMERICA, } MOTION TO REMAND ACTION TO
17 DOES 1 TO 20, } STATE COURT
18 Defendants. }
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21 **I. INDEMNITY HAS NOT DEMONSTRATED THAT THIS COURT**
HAS JURISDICTION OVER THIS MATTER.

22 As the cases cited in the Regents' motion indicate, the party seeking to
23 invoke the jurisdiction of the federal courts must demonstrate the basis for that

1 jurisdiction. Here, in opposition to the Regents' motion to remand, Indemnity has
 2 not met that burden, and the matter should therefore be remanded to state court.
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4 **II. THE REGENTS IS NOT DIRECTLY INVOKING THE 11TH
 5 AMENDMENT AS AN IMMUNITY TO REMOVAL**

6 Indemnity sets up a straw man in citing to California ex rel. Lockyer v.
 7 Dynegy, Inc. (9th Cir. 2004) 375 F. 3d 831, and similar cases. The issue here is not
 8 whether the 11th Amendment provides the Regents with an immunity to this court's
 9 otherwise valid assumption of jurisdiction over this case, as was raised by the State
 10 of California in Dynegy and by the State of Mississippi in In re: Rezulin Prod.
 11 Liab. Litig. (S. D. N. Y. 2001) 133 F. Supp. 2d 272. The issue here is whether the
 12 Regents is the alter ego of the State of California and therefore not a "citizen" for
 13 purposes of the diversity statute, i.e., whether there exists a valid basis in the
 14 United States Code by which this court may assert jurisdiction. This is a subtle yet
 15 highly important distinction.

16 The Regents has argued that the reasoning of the 11th Amendment cases
 17 provides the analytical framework for answering the question here, as has been
 18 held by the Fourth, Fifth and Eleventh Circuits in the cases cited in the motion (see
 19 Regents' Motion at pp. 5 – 7). States and their instrumentalities are not "citizens,"
 20 whether plaintiff or defendant.

21 As Indemnity concedes in its opposition memorandum, the case of Regents
 22 of the University of California v. Eli Lilly & Co. (1997) 119 F. 3d 1559 involved a
 23 very different procedural posture than is presented here. Among other
 24 dissimilarities, that case involved a federal question (enforcement of patent rights).

1 Here, there is no federal question raised by the Complaint to serve as a basis for
 2 jurisdiction.

3 **III. NOTWITHSTANDING INDEMNITY'S ARGUMENTS, THE
 4 REGENTS IS AN "ARM" OF THE STATE.**

5 In its opposition, Indemnity cites University of Rhode Island v. A. W.
 6 Chesterton Co. (D. R. I. 1989) 721 F. Supp. 400. Whatever that University's
 7 relation to the state of Rhode Island, the case begins with the proposition advanced
 8 by Regents, which is that "the 'alter ego' test employed in Eleventh Amendment
 9 cases is 'pretty much the same' as that employed for the purpose of determining
 10 diversity jurisdiction." 721 F. Supp. at 401 (citations omitted) Since the Regents
 11 has been held to be an "arm" or "alter ego" of the State of California for purposes
 12 of the 11th Amendment, the same reasoning compels the conclusion that it is the
 13 "arm" or "alter ego" for purpose of the diversity statute.

14 Indemnity cites a quote from Vaughn v. Regents of University of California
 15 (N. D. Ca. 1981) 504 F. Supp. 1349, that "each University must be evaluated under
 16 its own circumstances." That does not change the fact that the circumstances of
 17 this particular University have been evaluated, and it has been found to be an
 18 "arm" of the State. The Vaughn decision considered all of the same evidence
 19 relied on by Indemnity, including the Regents' power to issue revenue bonds for
 20 certain purposes.¹ Two important factors to that decision were that the Regents
 21 performs an essential state government function and that awards against the
 22 Regents would ultimately be satisfied from "state funds" (which does necessarily

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 24 ¹ All of the Cal. Educ. Code Sections cited by Indemnity at p. 5 of its opposition appear to come from the Chapter
 25 permitting the Regents to issue revenue bonds, known as the University of California Revenue Bond Act of 1947.
 By definition, revenue bonds are repaid by funds generated from the specific project being funded with the debt.
 The Regents has no information to indicate that the road project at issue was funded by revenue bonds.

1 mean money literally taken out of the state treasury). 504 F. Supp. at 1354, and fn.
 2 5. For example, as detailed in the Vaughn decision, the University of California
 3 has “first claim” on state funds under the state constitution, 504 F. Supp. at 1354,
 4 fn. 6.² Although several factors may be relevant, as indicated in the cited footnote
 5 from Regents of the University of California v. Doe (1997) 519 U. S. 425, the
 6 Supreme Court also made clear that it was of “considerable importance” that the
 7 State of California would be “legally and practically” responsible for the money at
 8 issue in that case. Doe, supra, 519 U. S. at 430. This was also a factor which the
 9 Vaughn court emphasized.³ “When indicators of immunity point in different
 10 directions, the Eleventh Amendment’s twin reasons for being [i.e., states’
 11 potentially being held liable for debts by federal courts, and respect for states’
 12 sovereignty] remain our prime guide.” Hess v. Port Authority Trans-Hudson Corp.
 13 (1994) 513 U. S. 30, 50.

14 Importantly, since the Vaughn case, the Ninth Circuit has held in other
 15 published decisions that the Regents is an “instrumentality” of the state for
 16 purposes of the 11th Amendment. E.g., Thompson v. City of Los Angeles (9th Cir.
 17 1989) 885 F.2d 1439, 1443 (“It has long been established that UC is an
 18 instrumentality of the state for purposes of the Eleventh Amendment”); BV
 19 Engineering v. Univ. of Calif., Los Angeles (9th Cir. 1988) 858 F.2d 1394, 1395,
 20 cert. denied, 489 U.S. 1090 (1989).

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22 ² In the 2006-07 general budget, the state committed \$3.1 billion to the University of California system. See Section
 23 III of “Major Features of the 2006 California Budget,” Legislative Analyst’s Office (July 2006), found at
http://www.lao.ca.gov/2006/major_features/major_features_2006.html.

24 ³ It is ironic that Indemnity relies on the Doe decision, since in that case the United States Supreme Court rejected
 25 the argument that the State’s funds were not at risk because a third party, the Department of Energy, would
 purportedly indemnify the Regents for any adverse judgment. Here, the question is whether Indemnity has an
 obligation to indemnify Regents for the property damage under the insurance policy at issue. If this court rules
 against the Regents’ claim, it will have an impact on “state funds.” See Regents’ Motion at 6:9 to 7:4.

For these reasons, the Court is requested to order that this matter be remanded.

DATED: August 1, 2007

Respectfully submitted,

REGENTS OF THE UNIVERSITY
OF CALIFORNIA

By: /s/ *Michael P. O'Bresly*
Michael P. O'Bresly
Its Counsel

1 CERTIFICATE OF SERVICE

2 I, Michael P. O'Bresly, hereby certify that on this the 1st day of August, 2007, at
3 approximately 4:50 p.m., I caused a true copy of this document, Regents' Memorandum in Reply
4 to Opposition to Motion to Remand, to be transmitted to counsel of record for the defendant
5 Indemnity Insurance Company of America Inc. via electronic mail.

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7 Dated: July 11, 2007

/S/ Michael P. O'Bresly

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